89-1572

No. _____

IN THE

Supreme Court of the United States

OCTOBER TERM 1989

GENE P. DENNISON, DANA B. WILKERSON, JR., and THOMAS C. HERRMANN,
Petitioners

v.

UNITED STATES OF AMERICA,
Respondent

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

ROBERT BRUCE GREEN
Counsel of Record
FOR PETITIONER
THOMAS C. HERRMANN
GREEN AND GREEN
P. O. Box 2362
Muskogee, OK 74402
918-683-0309

MICHAEL FAIRCHILD
Counsel of Record
GENE P. DENNISON
Pro Se
The Downing Mansion
232 North Santa Fe
Tulsa, Oklahoma 74127
918-585-1544

JULIAN FITE
Counsel of Record
FOR PETITIONER
DANA B. WILKERSON, JR.
P. O. Box 87
Muskogee, OK 74402
918-687-5424

Cone-Lewis Printing Co. • 16 N. College • Tulsa, OK 74110 • Phone (918) 832-8886

QUESTIONS PRESENTED FOR REVIEW:

1. Whether mid-trial dismissal of criminal prosection by the trial court was proper under Rule 16, Federal Rules of Criminal Procedure, *Brady v. Maryland,* 371 U.S. 83 (1986) and the court's 'supervisory' powers, in situations where there were extensive, continuous and ongoing violations of court discovery orders as well as two ex-parte conferences with the court by the government and a history of discovery abuse in the district.

2. What standard of review is applicable to mid-trial dismissal of criminal prosecution by trial court?

A. Harmless error, Rule 52, Federal Rules of Criminal Procedure.

B. Imposition of sanctions not to be disturbed absent abuse of discretion.

C. Are A and B mutually compatible?

3. Is a subsequent prosectuion of Defendants barred by double jeopardy rule on either of two theories:

A. Under facts of case, did prosecutorial failure to comply with continual orders for discovery rise to level of wanton disregard for rights of Defendants and official government misconduct such as to meet standard for double jeopardy?

B. Was the mid-trial termination of the case related to or based on the evidence such as meet the standard for double jeopardy?

4. Under the facts of this case, in failing to file a brief or give notice to Defendants that appeal was authorized by the Department of Justice for almost six months, did the government fail to diligently pursue its appeal under 18 U.S.C. § 3731?

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(i) The date of opinion and judgment sought to be reviewed in December 1, 1989.

(ii) The rehearing was denied on January 9, 1990.

(iii) Cross-Petition—Not applicable.

(iv) Provisions believed to confer jurisdiction: The petition involves a denial of due process, denial of meaningful confrontation of witnesses, and violation of the double jeopardy clause all as found in the United States Constitution.

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PETITION FOR WRIT OF CERTIORARI

THE CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED IN THIS CASE

(1) Constitutional Provisions:

a. "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; **nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb**; nor shall be compelled in any criminal case to be a witness against

himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation." U. S. Constitution, Amendment V. (Emphasis added)

b. "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, **nor be deprived of life, liberty, or property, without due process of law**; nor shall private property be taken for public use, without just compensation." U. S. Constitution, Amendment V. (Emphasis added)

c. "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been commited, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; **to be confronted with the witnesses against him; to have compulsory process of obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence**." U. S. Constitution, Amendment VI. (Emphasis added)

(2) Statutes Involved:

18 USC 3731

"In a criminal case an appeal by the United States shall lie to a court of appeals from a decision, judgment, or order of a district court dismissing an indictment or information or granting a new trial after verdict or judgment, as to any one or more counts, except that no appeal shall lie where the double

jeopardy clause of the United States Constitution prohibits further prosecution.

An appeal by the United States shall lie to a court of appeals from a decision or order of a district courts suppressing or excluding evidence or requiring the return of seized property in a criminal proceedings, not made after the defendant has been put in jeopardy and before the verdict or finding on an indictment or information, if the United States attorney certifies to the district court that the appeal is not taken for purpose of delay and that the evidence is a substantial proof of a fact material in the proceeding.

An appeal by the United States shall lie to a court of appeals from a decision or order, entered by a district court of the United States, granting the release of a person charged with or convicted of an offense, or denying a motion for revocation of, or modification of the conditions of, or modification of the conditions of, a decision or order granting release.

The appeal in all such cases shall be taken within thirty days after the decision, judgment or order has been rendered and shall be diligently prosecuted.

The provisions of this section shall be liberally construed to effectuate its purposes."

(3) Rules Involved:

Rule 16 d (2) of the Federal Rules of Criminal Procedure.

(2) **Failure to Comply With a Request.** If at any time during the course of the proceedings it is brought to the attention of the court that a party has failed to comply with this rule, the court may order such party to permit the discovery or inspection, grant a continuance, or prohibit the party from introducing evidence not disclosed, or it may enter such other

order as it deems just under the circumstances. The court may specify the time, place and manner of making the discovery and inspection and may prescribe such terms and conditions as are just.

CONCISE STATEMENT OF THE FACTS

On August 18th, 1988, a ten count indictment was filed in the United States District Court for the Eastern District of Oklahoma charging the Defendants with various offenses, primarily alleging that there were misrepresentations and schemes to defraud a federally insured savings and loan institution. The Defendants were charged with submitting a false loan application stating they were purchasing property for more than was being actually paid for the property. Although the dismissal kept the Defendants from putting on their defense, it was apparent from the Prosecution's first witness that the loan was approved and committed to by the savings and loan many months before a loan application was ever filed.

The critical evidence dealt with the credibility of the government's chief witness as it related to his dealings with the defendants and his representations to the savings and loan.

Pursuant thereto the Court ordered the prosecution to turn over to the Defendants prior to trial any exculpatory material or any material which would impeach the above witness.

As the trial progressed it became apparent that the Government had refused or failed to provide the Defendants with the following material:

1. The plea bargain agreement between the witness and the Government which disclosed similar transactions involving this witness and other savings and loans.

2. Numerous nefarious transactions between the witness and other lending institutions which had been the subject of federal investigations.

3. FBI investigations which led to the conclusion that the loan was based on the appraisal of the property rather than on a loan application as alleged.

4. Actual documents which showed that the witness was lying on the stand in relation to his past pastnership dealings.

5. Five drawers of files showing the witness' relationship to loans in excess of seventy-five million dollars which had all gone into default.

6. Documents from the Federal Bank Board referring to the above witness' financial statements as being false and fraudulent.

7. Records showing that the witness received $300,000.00 in under the table payments in another transaction which he denied being involved in during cross-examination. The government allowing these statements to stand knowing full well his receipt of said payments. These records were not turned over to the Defendants until after he had left the stand.

8. In short, the defense was required to review during the trial and after the witness had been cross-examined well over 450 files which were related to the witness, were in the possession of the U.S. Attorney and had not been turned over to the defense pursuant to the court's orders. The defendants firmly believe that they had only discovered the tip of the iceberg at the time the trial was stopped.

The trial commenced on October 3rd, 1988 and after numerous delays and continuances for compliance by the Government, the trial court gave up warning the prosecution

and dismissed the action with prejudice because of the Government's failure to comply with its obligation under Rule 16 of the Federal Rules of Criminal Procedure and under *Brady v. Maryland, supra.* The Court further found that the Government had a long history of discovery abuses, and had withheld material which denied the Defendants a fair trial, and were guilty of prosecutorial misconduct and of acting in bad faith. Further, that the Defendants had acted in good faith and tried to assimilate the material as the prosecution had made it available in bits and pieces, but the prosecutorial misconduct had reached constitutional proportions and was aggravated by two ex-parte conferences in which the Government had tried to dissuade the court from continuing to order further discovery.

The Government appealed the District Court's dismissal with prejudice to the Tenth Circuit Court of Appeals who reversed.

REVIEW OF JUDGMENT OF A STATE COURT

NOT APPLICABLE

REVIEW OF JUDGMENT OF A FEDERAL COURT IN THE FIRST INSTANCE

Federal Jurisdiction was established in the first instance by the Government's appeal of the dismissal pursuant to **18 USC 3731**.

ARGUMENT

Petitioners contend that each of the four questions presented for review meet the criteria set forth in Rule 10, Supreme Court Rules, for considerations governing review on certiorari.

1. Whether mid-trial dismissal of criminal prosecution by trial court was proper under Rule 16, Federal Rules of Criminal Procedure, *Brady v. Maryland*, and court's 'supervisory' powers, in situation where there were extensive, continuous and ongoing violations of court discovery orders by the government.

Petitioners admit that this issue presents a complicated fact situation but contend that examination of the facts relied on by the district court must be examined in order to determine the crucial issue here presented—prejudice to Defendants or harmless error. It is admitted that errors at trial, if they can be considered harmless error, would dictate reversal of the dismissal of the case, *United States v. Hasting*, 461 U.S. 499 (1983), unless this is a willful misconduct situation as contemplated by *Taylor v. Illinois*, 484 U.S. 400 (1988).

The district court in this case granted continuances during trial, ordered the government to produce evidence in its possession daily and finally stated in its final ruling:

> "Some failures to disclose, although reprehensible, do not deprive the Defendants of a fair trial because they are either minuscule or mere inadvertence by the prosecutor or otherwise inconsequential. After all, one is entitled to a fair trial, not a perfect trial. Unfortunately, the discovery abuses in this case have reached constitutional proportions. That is, they are so egregious that the defendants have been denied a right to a fair trial."

In its opinion, the 10th Circuit Court of Appeals merely substituted its opinion for that of the trial court, stating "nor has prejudice been shown."

In this case, the issue of 'what is prejudice' is clearly presented. The Court of Appeals did not criticize or disagree

with the numerous district court rulings that the government had failed to provide Rule 16 and *Brady* materials as previously ordered. The Court of Appeals accepted the record showing that defense counsel and Defendants were faced on each of the five days of trial with new evidence and materials, previously undisclosed, that had a direct bearing on the cross-examination of witnesses and the conduct of the trial. The Court of Appeals accepted the facts that defense counsel and the Defendants were ordered to examine boxes of documents previously undisclosed, at recesses or at night after midnight and then to appear for court at 7:30 a.m. to continue the trial and argument as to further discovery. The Court of Appeals accepted the record showing numerous extra hours in court to deal with these problems as well as recesses (or continuances) to try to resolve the problems with discovery. Yet the Court of Appeals found that Defendants were not prejudiced in their ability to defend against the indictment.

This Court reiterated its earlier standard that a "conviction should not be overturned unless, after examining the record as a whole, a court concludes that error **may** (emphasis added) have had 'substantial influence' on the outcome of the proceeding." *Bank of Nova Scotia v. United States,* 487 U.S. 250 (1988); *Kotteakos v. United States,* 328 U.S. 750 (1946). In the final paragraph of *Bank of Nova Scotia*, this court found,

> "we conclude that the District Court had no authority to dismiss the indictment on the basis of prosecutorial misconduct absent a finding that petitioners were prejudiced by such misconduct. The prejudicial inquiry must focus on whether any violations had an effect on the grand jury's decision to indict. If such violation did substantially influence this decision, or if there is grave doubt that the decision to indict was free from

such substantial influence, the violations cannot be deemed harmless."

In *Hasting, supra,* this Court used a 'harmless beyond a reasonable doubt' standard for error at trial. Can one say, in all honesty, that the error, admitted by all in this case would not have had an impact on the jury 'beyond a reasonable doubt.'

Petitioners respectfully submit, and the district court found, that due to extensive government misconduct at trial, Defendants could not receive a fair trial, there was prejudice, and the case should be dismissed.

It should also be noted that in *Bank of Nova Scotia,* the Court stated " . . . we are not faced with a history of prosecutorial misconduct, spanning several cases, that is so systematic and pervasive as to raise a substantial and serious question about the fundamental fairness of the process . . ." In this case, the Court of Appeals makes direct reference to ongoing discovery violations in this same district. (See also *U.S. v. Peveto,* 881 F.2d 844 [10th Cir., 1989], wherein the same trial court chastised the same U.S. Attorney's administration for a history of discovery abuse.)

This Court has apparently not spoken to trial court imposition of sanctions under **Rule 16(d)(2)** Federal Rules of Criminal Procedure and its relationship to 'supervisory powers' of the trial court. What does " . . . or it may enter such other order as it deems just under the circumstances" mean? If a district court can suppress evidence and virtually terminate a prosecution when there is no prejudice, cannot that same court dismiss a case for the same reasons, particularly when it finds prejudice of constitutional proportions?

2. What standard of review is applicable to mid-trial dismissal of criminal prosecution by trial court?

A. Harmless error, Rule 52, Federal Rules of Criminal Procedure.

B. Imposition of sanctions not to be disturbed absent abuse of discretion.

C. Are A and B mutually compatible?

Recent cases from this Court demonstrate that error, if harmless, does not permit dismissal of a case or indictment. *Bank of Nova Scotia, supra.* Thus, a harmless error standard has been imposed that must be considered on review. However, this Court, in *United States v. Hasting, supra,* indicated a standard of 'beyond a reasonable doubt' for determining what is harmless.

On the other hand, recent cases seem to indicate that there is some viability to sanctions under Rule 16(d)(2) Federal Rules of Criminal Procedure concerning violations of discovery orders. *United States v. Wicker,* 848 F.2d 1059 (10th Cir. 1988). In *Wicker* and several other cases cited therein, suppression of evidence (tantament to dismissal) has been readily upheld even when no prejudice to defendant is shown *United States v. Campagnuolo,* 592 F.2d 852 (5th Cir. 1979).

Although this case deals with a dismissal of the case rather than suppression of critical evidence (the same thing) the Court of Appeals seems to have imposed a different standard than in its prior ruling in *Wicker.*

Petitioners respectfully submit that the latitude to be given the district court relating to rulings on critical discovery matters should be rather broad, and that 'abuse of discretion' as a basis for reversal should be sparingly imposed. Further, an objective

finding as to where and how that abuse of discretion occurred should be required. In this case, the Court of Appeals found no fault with the record and the trial court discovery rulings; it merely substituted its conclusions of 'no prejudice/abuse of discretion' for the trial court's conclusions.

Petitioners respectfully request that this Court accept this case for determination of the relationship of standards of review of 'harmless error' and 'abuse of discretion' in regard to **Rule 16(d)(2)** and the trial court's supervisory powers.

This issue is presented in Justice Scalia's concurring opinion in *Bank of Nova Scotia, supra,*

> "I agree that every United States court has an inherent supervisory authority over the proceedings conducted before it, which assuredly includes the power to decline to proceed on the basis of an indictment obtained in violation of the law. I also agree that we have authority to review lower court' exercise of this supervisory authority, insofar as it affects judgments brought before us, though I do not see the basis for any direct authority to supervise lower courts."

In *Taylor v. Illinois,* 484 U.S. 400, 108 S.Ct. 646, 98 L.Ed.2d 798 (1988), this Court deemed it proper to exclude the testimony of an alibi defense witness due to violation of a reciprocal discovery rule. In doing so, the Court stated,

> "The integrity of the adversary process, which depends both on the presentation of reliable evidence and the rejection of unreliable evidence; the interest in the fair and efficient administration of justice; and the **potential prejudice** (emphasis added) to the truth determining function of the trial process must also weigh in the balance."

If failure to reveal the name of a witness justifies depriving

a criminal defendant of a crucial witness, does not wholesale failure to provide discovery materials and *Brady* evidence justify suppression of the government evidence and mid-trial dismissal in light of those important and continual violations of discovery orders?

3. Is a subsequent prosecution of Defendants barred by double jeopardy rule on either of two theories:

A. Under facts of case, did prosecutorial failure to comply with continual orders for discovery rise to level of wanton disregard for rights of Defendants and official government misconduct such as to meet standard for double jeopardy?

B. Was the mid-trial termination of the case related to or based on the evidence such as meet standard for double jeopardy?

In this question, Petitioners present for review two issues under the Double Jeopardy Clause of the United States Constitution. The theories advanced by Petitioners have not been dealt with directly by this Court but are closely related to rulings promulgated by this Court.

A. Prosecutorial misconduct:

Although this Court has severely limited the attachment of jeopardy where mistrial or dismissal occurs due to prosecutorial misconduct, Petitioners urge that some extreme cases of gross negligence and bad faith on the part of the government justify the attachment of jeopardy and bar retrial. In *Oregon v. Kennedy,* 456 U.S. 667 (1982), the majority opinion stated that the misconduct standard justifying the bar of double jeopardy is "limited to those cases in which the conduct giving rise to . . . mistrial was intended to provoke the defendant into moving for mistrial." *Id.* at 679. However, in that same case, Justice

Brennan, joined by three other Justices in a concurring opinion suggested that where a "prosecutor engages in misconduct, not with the intention to provide a mistrial, but to unjustly convict the defendant", then jeopardy should attach and bar retrial. That is the situation here presented where the government intended and tried to put on a case without revealing essential documents and evidence demonstrating the virtually nonexistent credibility of their key witness and others.

While the prosecutors claimed ignorance of these many types and sources of discovery and *Brady* evidence, that claim of ignorance does not justify the utter lack of proper investigation and inquiry into information in the hands of the government and readily available to the prosecutor. In *United States v. Bryan,* 868 F.2d 1032 (9th Cir. 1989), the Court determined, "The prosecutor will be deemed to have knowledge of and access to anything in the possession, custody or control of any federal agency participating in the same investigation of the defendant." *Id.* at 1036.

Notwithstanding the narrow ruling in *Oregon v. Kennedy, Supra,* it is the contention of Petitioners that jeopardy resulting from prosecutorial misconduct and bad faith referred to by Justice Brennan as seeking an 'unjust conviction' is still a viable concept in American jurisprudence. See *Fong Foo v. United States,* 369 U.S. 141 (1962); *United States v. Means,* 513 F. 2d 1329 (8th Cir. 1975).

Does it matter whether government conduct is intentional, the result of gross negligence, or a wanton disregard for defendants' rights when the result is the same? An accident or minor error, even if necessitating a mistrial, is not grounds for the attachment of jeopardy. However, when the error is, as in this case, continuous, prejudicial and ongoing should not justice dictate the attachment of jeopardy and bar retrial of the defen-

dants? Should not the history of such abuse in the Judicial District be taken into consideration?

B. Dismissal or acquittal based on evidence:

It is clear that a dismissal or acquittal by a trial court based on sufficiency of the evidence, no matter how egregiously erroneous, is final and involves the bar of double jeopardy against retrial of the defendants. *Fong Foo v. United States,* 369 U.S. 141 (1962); *Sanabria v. United States,* 437 U.S. 54 (1978); *United States v. Martin Linen Supply Company,* 430 U.S. 564 (1977).

The trial court in this case almost exactly duplicated the court in *Fong Foo, supra,* except that it made even more damaging rulings concerning prejudice to the defendants and the bad faith of government prosecutors. In the *Martin Linen Supply* case, *supra,* the trial judge granted an acquittal after all the evidence was in and the jury could not reach a verdict.

The trial judge in this case evaluated the status of the evidence particularly in reference to evidentiary errors due to government failure to obey the court's orders, and determined that the evidentiary problems with the case necessitated its termination. Petitioners submit that such a ruling is tantamount to a ruling that the evidence at trial could not justify a conviction of Defendants and necesarily involved the bar of double jeopardy.

Since the evidentiary difficulties at trial mainly related to the chief and essential government witness, the court could have just excluded that witness' testimony and forced the government to dismiss a part, if not all, of its case. There is little question that such a decision would have been upheld by the Court of Appeals. See *United States v. Wicker,* 848 F. 2d 1059 (10th Cir. 1988).

The failures of government prosecutors to comply with discovery orders pre-trial and each day of a five-day trial amounted to 'clear error' at every stage and on every day of this trial. *Napue v. Illinois,* 360 U.S. 264 (1959); *Giglio v. United States,* 405 U.S. 150 (1972). This should be considered in light of the past history of discovery abuse as stated in the courts final order dismissing the case with prejudice.

The results of the evidence finally given to defendants, not even considering those matters left undiscovered, demonstrated the utter lack of any credibility of the government's key witness, and direct refutation of key allegations of the indictment. Had these matters been properly available pre-trial to counsel for defendants, a pre-trial motion to dismiss should have been granted. Since such evidence was dragged out piecemeal at trial, defendants and defense counsel were sorely tested to even glance at these materials, let alone adequately prepare a proper defense and cross-examination in light of the daily addition of discovery and exculpatory materials.

Petitioners respectfully submit that the trial court ruling in this case, based on the evidence, was every bit as conclusive as the rulings in *Fong Foo, Sanabrie,* and *Martin Linen Supply, supra,* and thus invoke the bar of double jeopardy against retrial.

4. Under the facts of this case, in failing to file a brief or give notice to Defendants that appeal was authorized by the Department of Justice for almost six months, did the government fail to diligently pursue its appeal under 18 U.S.C. § 3731?

The last issue presented is that the appeal was not diligently prosecuted.

A portion of **18 U.S.C., § 3731,** states:

"The appeal in all such cases shall be taken within 30 days after the decision, judgment or order has been rendered and shall be diligently prosecuted."

The government in this case did not diligently prosecute the appeal. After receipt of Notice of Intent to Appeal, the petitioners were not officially notified that the Department of Justice had authorized the appeal in this case until they received the government's brief in May, 1989. The order appealed from was entered October 12, 1988. In the meantime, the government obtained two extensions. The first motion stated that the case load in the U.S. Attorney's office was such that they needed extensions. These applications for extensions were filed by the United States Attorney's office. It should be noted that the brief was filed by the Department of Justice from Washington, D.C. The brief was first due on February 28, 1989, which means the government had the transcript since January, 1989. Petitioners objected to both extensions.

In the case of *United States v. Jenkins* (1975) 420 U.S. 358, 43 L.Ed.2d 250, 95 S.Ct. 1006, the Notice of Appeal was filed by the government within the requisite 30 days, but the government did not file its brief until seven (7) months later. The Court of Appeals indicated that it would have dismissed the appeal for failure to prosecute diligently had the respondent so requested. The Supreme Court noted the statement by the Court of Appeals and further noted that the respondent similarly made no such request before it. The Supreme Court, however, did not indicate how it would have ruled on the request had it been made (*United States v. Scott,* 437 U.S. 82, 57 L.Ed.2d 65, 98 S.Ct. 2187 (1978), overrules a portion of the *Jenkins* case, but does not mention this).

In *United States v. Goldstein* (1973, C.A.2 NY), 479 F.2d 1061, cert den., 414 U.S. 73, 38 L.Ed.2d 113, 94 S.C. 151, the Government appealed from the district court order dismissing an indictment. The court noted that the government's brief was not filed until nearly six (6) weeks after the Notice of Appeal, and stated that in view of the statutory command of diligent prosecution, it believed that the government's briefs in appeals of this sort should ordinarily be filed within 30 days after the Notice of Appeal. However, they did not dismiss for this reason.

We do not feel that there is a definite time limit within which one could say the government "diligently prosecuted" the appeal. However, in this case, the Notice of Appeal was filed November 10, 1988, and the brief was not filed until May 1, 1989. This would be approximately five (5) months and 20 days. During this time the government contended that the overload of work in the office of the United States Attorney was the reason that it could not get the brief filed. The truth is that the brief was not filed by the office of the United States Attorney, but was filed by the Department of Justice in Washington, D.C. No reasons have been given as to why it took that office that long. One can only assume that the government was truthful with the court when it stated that the brief could not be filed because of the workload in the United States Attorney's office. How the workload affected the ability of the Department of Justice to read a transcript, do research and prepare a brief, is not explained.

We do not feel that this appeal was diligently prosecuted by the government. As a result, the statute giving the government the right to appeal in this case was not followed and the appeal should be dismissed.

CONCLUSION

The Court of Appeals disregarded the findings of the Trial Judge who was in a unique position to determine not only the prejudice suffered by the defendants but also the ex parte conferences and the long history of discovery abuses in the district. The Governments continued efforts to conceal information which was critical to the defense will now go without sanction. Further any attempt in the future by a District Judge to control his court room will be placed in the hands of the Government prosecutor who now knows that he has only to allow the Court to dismiss his action which will give him additional time to prepare and school his witness to the information he has had to divulge. A writ of certiorari should issue to review the judgment and opinion of the Court of Appeals, 10th Circuit to give the control of the court room back to the Trial Judge so that justice may prevail.

Very respectfully submitted,

MICHAEL FAIRCHILD
232 North Santa Fe
Tulsa, Oklahoma 74127
Attorney for Petitioner
Gene P. Dennison

BRUCE GREEN
GREEN AND GREEN
P. O. Box 2362, Muskogee, OK 74402
Attorneys for Petitioner
Thomas C. Herrmann

JULIAN FITE
P. O. Box 87, Muskogee, OK 74402
Attorney for Petitioner,
Dana B. Wilkerson, Jr.

APPENDIX A

EXCERPT FROM PROCEEDINGS

October 12, 1988

THE COURT: Let's see. The Government is here and all three defendants are here.

I'll tell you that I've examined this information now that you've given me, these that you refused to turn over. And I find that there is no exculpatory evidence in this material, but make that a part of the Court's record.

So I take it under those circumstances I ought to sustain your motion for a protective order, after having examined it at this time.

MR. HILFIGER: May I be excused, Your Honor?

THE COURT: Well, yes. I'm going to make an announcement. If you want to stay, you may.

Call the jury in, if you will, please.

(JURY RETURNS TO COURTROOM)

THE COURT: Show the jury in the box and the defendants and their lawyers here, and the Government here.

I apologize again, ladies and gentlemen, for your having to wait this morning. But, we were here all day yesterday working on these matters, and then beginning again at 7:30 this morning

until after time for you to come in here. And I have since that time had some decisions to make on some motions that have been made throughout this trial.

And I am going to announce my decision with you here. And the reason for that is because I believe that you folks have been required to be here. You have not, I'm certain, because you're not lawyers, and even some lawyers couldn't understand why you had to wait as long as you have many times during this trial. And particularly coming here yesterday and then being sent back home. It's difficult to understand some of these things, so I've drafted sort of an opinion, and I've put it in some of my views and some of what has gone on to let you know, because I think you're entitled to know what goes on. Just as the public is entitled to know what goes on in our courts, juries sometimes don't get the true story because they're behind closed doors when the real meat of the subject occurs. And I think you're entitled to know about these things. So, over the last hour or so, while I was also examining some other material, I drafted this statement, this opinion, and this decision to be made.

I have worked in this case and had more difficulty with it than I have in virtually any other—I would say more than I've had in any case I've had in the twenty years that I've been a trial judge because of some problems we've had. And I think that will be explained to you in this decision that I'm going to read to you now. But I've agonized over this decision over the last—well, since—virtually since this case began, with troubles and problems we've had with it.

And in this case the United State Attorney's Office has repeatedly and continuously failed and refused to comply with the discovery order of the Court which was made sometime

prior to trial, which ordered the United States Attorney's Office to comply with the letter of the law. And the law is that it is their, The United States Attorney's Office, their legal duty and obligation to give the defendants any evidence in their custody and control impeaching a Government witness or tending to prove the defendants not guilty. This does not seem too much to ask, when the failure to do so might possibly result in an innocent person being convicted.

The Court has ordered, asked, cajoled, pleaded, directed the United States Attorney's Office to disclose the information which would enable the jury to hear both sides so that they will not be asked to make a decision in the dark. The United States Attorney's Office has refused. The defendants are entitled to face their accusers, and to test the motives and credibility of their accusers. The United States Attorney's Office for some unknown reason has attempted to hide from the defense counsel, the Court and the jury evidence which might prove the defendants innocent of one or all of the crimes with which they are charged. They have produced much of the evidence they have produced that they were supposed to produce only after the long hearings which are ordinarily unnecesary, which have kept you waiting.

At one dark time in this country's past it was not error, in fact it was common practice for police officers and prosecutors to outright hide the past misdeeds and evil motives of Government witnesses, and even outright proof of the defendant's innocence was often hidden. These days are over. Our courts and all right thinking Americans have condemned such practices. Some such failures to disclose, although reprehensible, do not deprive the defendants of a fair trial because they are either miniscule or mere advertence by the prosecutor or otherwise inconsequential. After all, one is entitled to a fair trial, not a

perfect trial. Unfortunately, the discovery abuses in this case have reached constitutional proportions. That is, they are so egregious that the defendants have been denied a right to a fair trial.

The Government's failure to comply has been wholesale and ongoing. It has continued day after day after day, and on into at least yesterday, the fifth day of trial. Regrettably, the Government's actions have been in bad faith and shocked the conscience of this Court. These actions constitute prosecutorial misconduct, and some sanction against the Government is necessary.

Mistrial, that is another trial at a later time, and continuance of this trial are inappropriate sanctions because they would enable the Government to take advantage of their own misdeeds and proceed on another day without any kind of penalty. In fact, it would penalize the defendants for being here and being ready to go to trial, as is their constitutional right, in addition to the substantial additional costs they would incur.

Dismissal of the Government's case against all three defendants is, in the opinion of this Court, the only appropriate sanction. And, therefore, I order that the cases, all cases, all counts against all three defendants in this case be dismissed.

Now, you folks on this jury, and the public, and all those involved, both the Government and the defense, may agree or disagree with the Court's decision. And I'll tell you again, that I've never made such a decision in my twenty years as a trial judge, but I've never had such egregious circumstances as this occur ever in twenty years that I've been a trial judge. And it became too much, and it got to the point where the defendants, in my opinion, could not receive a fair trial, and I've taken the steps that I've taken.

So, I'm going to dismiss you and tell you that you are now at liberty to discuss this material with anyone you care to discuss it with. You don't have to discuss it with anyone if you don't want to. You may discuss it. But, of course, if anyone wants to talk with you about it and you don't want to talk with them about it, then that's all you have to say is that you don't want to discuss it with anyone.

The exception to your discussing it with anyone, as you well know if you've sat on another jury here, is that you cannot discuss this matter with the lawyers who represent either side or any agents of theirs, because there is a rule protecting our jurors. And that's the reason for the rule. It protects our jurors to see that they are not disturbed in their decisions that they have made. So, unless one of the lawyers or any agent of theirs had a direct order of this Court then they could not discuss it with you.

Your checks will be sent to you right away. There are some of you, in fact I believe many of you are on other juries. The next case to be tried is the Sullivan jury. And Mable White, Sherman Sanders, Marilyn Darrow, and Ivy Cunningham are on that jury. And that case will commence at one o'clock tomorrow afternoon.

If you would like to take off your juror buttons and those of you on the back row pass them forward to the folks on the front row, and lay your juror buttons there on the rail, you won't have to go back by the clerk office.

I apologize again for you folks—for the time that you have been out, the effort on your behalf, the times you should have been with your family, at your work, when you've been here. And it may seem unnecessary. And sometimes the wheels of justice turn a little slowly, and sometime they reach what you

believe to be justice, and sometimes they don't. But, in my opinion, and I assure you that there has been justice in this case, and the only thing you have been out is this time. And after all time is not important when such important matters are at stake.

Thank you very much. And remain seated while these folks leave.

(JURY EXCUSED)

THE COURT: Now, the jury is gone. The door is closed. I intend to release these defendants and exonerate their bond.

And before I do that, is any record to be made, Mr. Teakell?

MR. TEAKELL: No, Your Honor.

THE COURT: Any for the defendants?

MR. GREEN: No, Your Honor.

MR. FITE: None, Your Honor.

MR. ECHOLS: No, Your Honor.

THE COURT: Then I order the defendants released and their bonds exonerasted.

The next case will be—start the Sullivan case, will start at one o'clock tomorrow afternoon. And I have just released an order that we'll have the hearing on the motion to reconsider at nine o'clock in the morning.

(EXCERPT CONCLUDED)

*****

CERTIFICATE

I certify that the foregoing is a correct transcript from the record of proceedings in the above-entitled matter.

S/S STEPHEN D. ALLEN, C.S.R. DATE 10-27-88

APPENDIX B

FILED
United States Court of Appeals
Tenth Circuit
DEC 1 1989
ROBERT L. HOECKER
Clerk

PUBLISH

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

Nos. 88-2802, 88-2805, 88-2806

UNITED STATES OF AMERICA,
Plaintiff-Appellant,
v.
GENE P. DENNISON, DANA B. WILKERSON, JR.
THOMAS C. HERRMANN,
Defendants-Appellees

Appeal from the United States District Court
For the Eastern District of Oklahoma
(D.C. No. 88-33-CR)

Michael R. Lazerwitz (and Deborah Watson, Attorneys, Department of Justice, Washington, D.C.; Roger Hilfiger, United States Attorney, Eastern District of Oklahoma, with him on the brief), for Plaintiff-Appellant.

Michael J. Fairchild, Attorney for Gene P. Dennison, Defendant-Appellee.

Julian K. Fite, Attorney for Dana B. Wilkerson, Jr., Defendant-Appellee.

Bruce Green of Green and Green, Muskogee, Oklahoma (Robert M. Butler, Tulsa, Oklahoma, with him on the brif), Attorneys for Thomas C. Herrmann, Defendant-Appellee.

Before BALDOCK, EBEL, and McWILLIAMS, Circuit Judges.

McWILLIAMS, Circuit Judge.

In a multi-count indictment Dan L. Stefanoff, Gene P. Dennison, Dana B. Wilkerson, Jr., and Thomas C. Herrmann were charged with conspiring to defraud Phoenix Federal Savings and Loan Association of Muskogee, Oklahoma, an institution which was insured by the Federal Savings and Loan Insurance Corporation, and with otherwise obtaining monies of the Phoenix Federal Savings and Loan Association by fraud, deceit and false representation. The gist of the several charges was that the defendants represented to Phoenix that they had acquired, or were about to acquire, property near Denver, Colorado for a purchase price of $4,000,000, and, in connection with such acquisition, defendants sought, and obtained, a loan from Phoenix in the amount of 80% of the represented purchase price ($3,200,000), whereas in fact they acquired the property in question for $2,150,000.

Stefanoff entered into a plea agreement with the United States whereby the United States agreed not to pursue other potential criminal matters against him in return for which Stefanoff agreed to plead guilty to charges of violating 18 U.S.C. § 371, 1014-1006 and to testify as a government witness in the trial of the remaining three defendants, who had pled not guilty to all charges.

Prior to trial, the district court entered several discovery orders requiring government counsel to make available to defense counsel exculpatory evidence in their possession. Similar orders were also entered after trial commenced. After the government had called several witnesses, but long before it would have rested its case, the defendants moved to dismiss the indictment on the grounds that government counsel had failed to comply with the district court's several orders regarding discovery. The district court agreed with defense counsel, characterizing government counsel, *inter alia*, as being "green

as a gourd," and dismissed the indictment in its entirety as to all three defendants. The government appeals the three dismissal orders. The three appeals, which were separately briefed and argued, were companioned, but not consolidated, in this court. We reverse.

The government appeals pursuant to 18 U.S.C. § 3731, which provides, in pertinent part, that in a criminal case the United States may appeal to a court of appeals from a judgment of a district court dismissing an indictment "except that no appeal shall lie where the double jeopardy clause of the United States Constitution prohibits further prosection." The statute also provides that appeal in such cases shall be taken within thirty days after the judgment of dismissal has been entered and shall be "diligently prosecuted."

All three defendants filed motions to dismiss the government's appeal on the ground that the government has not "diligently prosecuted" its appeal in this court, and on the additional ground that the double jeopardy clause prohibits any retrial. We are not persuaded.

The district court dismissed the indictment on October 12, 1988. The government filed its notice of appeal on November 10, 1988, within the thirty-day period prescribed by 18 U.S.C. § 3731. The trial transcript was filed in the district court on January 20, 1989, which triggered the setting of a briefing schedule wherein the government's opening brief was due by March 1, 1989. The government sought, and obtained from us, two 30-day extensions of time within which to file its opening brief, which was filed on April 28, 1989. Two of the three motions to dismiss were filed on May 26, 1989, and the other was filed on June 2, 1989. The government's response to the motion to dismiss was filed on June 16, 1989.

The filing of a motion to dismiss an appeal by the appellees tolled the filing of their briefs. By order of August 18, 1989, the appellees were ordered to file their briefs by September 8, 1989, even though the motions to dismiss the appeal were still pending. Herrmann filed his brief on September 7, 1989, and Wilkerson and Dennison filed separate briefs on September 8, 1989. The government filed a reply brief on September 15, 1989. The case was orally orgued before the court on September 27, 1989.

The appellees concede that there is no "definite time limit" to determine whether the government has "diligently prosecuted" an appeal under 18 U.S.C. § 3731.[1] Appellees' "lack of diligence" argument is largely premised on the fact that the government obtained from us two extensions totalling sixty days within which to file its opening brief. We are not prepared to hold that such proves a lack of diligence on the part of the government. Some delay occurred while the motions to dismiss were pending in this court. Such, however, is not attributable to the government. All things considered, we believe the matter has been diligently pursued by all concerned in this court.

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[1] In this regard, the defendants cite *United States v. Jenkins*, 420 U.S. 358, 95 S. Ct. 1006, 43 L.Ed.2d 250 (1975) and *United States v. Goldstein*, 479 F.2d 1061 (2d Cir. 1973). In *Jenkins*, the government's brief was not filed until six and one-half months after the notice of appeal. However, the Supreme Court in *Jenkins* noted that the defendant had not urged in either the Court of Appeals or the Supreme Court that there was a failure by the government to diligently prosecute its appeal. In *Goldstein*, the government did not file its opening brief until six weeks after its notice of appeal. The Second Circuit in *Goldstein* in an footnote stated that, for appeals brought under 18 U.S.C. § 3731, 30 days from the notice of appeal is the appropriate time limit within which the government should file its opening brief. However, the Second Circuit in *Goldstein* did not reach the issue of whether the government had diligently prosecuted its appeal and decided the appeal on a different ground.

Nor are we persuaded that there is merit to appellees' double jeopardy argument. The general rule is that where a defendant in a criminal proceeding moves in mid-trial for a mistrial or dismissal on a basis unrelated to factual guilt or innocence of the offense of which he is accused (in our case on the basis of prosecutorial misconduct consisting of non-compliance with discovery orders) and his request is granted, he suffers no injury cognizable under the Double Jeopardy Clause if the government is permitted to appeal from such ruling in favor of the defendant. *United States v. Scott*, 437 U.S. 82, 98-99, 98 S. Ct. 2187, 2197-98, 57 L.Ed.2d 65, 78-79 (1978).

A narrow exception to the general rule occurs where the defendant is pressured or goaded into seeking a mistrial or dismissal because of prosecutorial misconduct. As will be developed later, prosecutorial misconduct in the instant case was apparently the result of inexperience, and possibly carelessness, on the part of trial counsel for the government and was not a calculated move by government counsel to provoke defendants into requesting dismissal. In support of the foregoing, *see United States v. Dinitz*, 424 U.S. 600, 96 S. Ct. 1075, 47 L.Ed. 2d 267 (1976); *United States v. Poe*, 713 F.2d 579 (10th Cir. 1983); *United States v. Martinez*, 667 F.2d 886 (10th Cir. 1981); and *United States v. Brooks*, 599 F.2d 943 (10th Cir. 1979). In *Dinitz*, the Supreme Court spoke as follows:

> The Double Jeopardy Clause does protect a defendant against governmental actions intended to provoke mistrial requests and thereby to subject defendants to the substantial burdens imposed by multiple prosecutions. It bars retrials where "bad faith conduct by judge or prosecutor," *United States v. Jorn, supra* at 485, threatens the "[h]arassment of an accused by successive prosecutions or declaration of a mistrial so as to afford the prosecution a more favor-

able opportunity to convict'' the defendant (citations omitted).

The reasons above stated, appellees' motions to dismiss will be denied.

As indicated, after trial commenced and several government witnesses had testified, the district court granted the defendants' renewed motions to dismiss the indictment because of the failure of the prosecutor to comply with the several discovery orders of the district court requiring the prosecutor to give to defense counsel any evidence in his custody or under his control which might tend to impeach a government witness or might otherwise tend to exculpate the defendants. In so doing, the district court commented, *inter alia*, that the government's failure to comply had been ''wholesale and ongoing'' and in ''bad faith,'' and that anything less than an outright dismissal, as opposed to a mistrial, would ''penalize the defendants for being here and being ready for trial.

The government's basic position is that although it did not fully and promptly comply with all discovery orders, such violations of discovery orders did not warrant the extreme sanction of dismissal of the indictment. Appellees' basic position is that the prosecutor's repreated violations of the district court's order were so egregious that dismissal of the indictment was proper. We are in accord with the government's analysis of the matter.

At the outset, the district court's characterization of the prosecutor's conduct as being the result of ''bad faith'' is simply not borne out by the record before us—inexperience on the part of the prosecutor, and perhaps carelessness, but not bad faith. Indeed, at one point in the proceeding the district court inquired of the prosecutor, who was apparently handling the case by himself, as to how many trials in federal court he had par-

ticipated in, and the prosecutor's answer that this was only his second trial was the basis for the district court's characterization of counsel as being "green as a gourd." We find nothing in the record to support the district court's finding that the prosecutor acted in "bad faith."

Fed. R. Crim. P. 16(d)(2) provides as follows:

> **(2) Failure to comply with a Request.** If at any time during the course of the proceedings it is brought to the attention of the court that a party has failed to comply with this rule, the court may order such party to permit the discovery or inspection, grant a continuance, or prohibit the party from introducing evidence not disclosed, or it may enter such other order as it deems just under the circumstances. The court may specify the time, place and manner of making the discovery and inspection and may prescribe such terms and conditions as are just.

In *United States v. Peveto*, 881 F.2d 844 (10th Cir. 1989), the district judge, who coincidentally is the same judge who presided in the instant case, determined that the government had failed to provide defense counsel with important evidence until the day trial commenced, in clear violation of discovery orders, and, as a sanction, granted the defendant a two weeks continuance. In so doing, the district judge rejected the suggestion that the evidence be excluded, as is permitted by Fed. R. Crim. P. 16(d)(2). The district judge in *Peveto* also rejected the suggestion that the indictment be dismissed because of the government's failure to comply with discovery orders, commenting that the interest of justice would not be "served well by dismissal of such a serious matter, because of some misdeeds by the government."

After the two weeks continuance, the jury in *Peveto* reconvened and the trial proceeded through to conclusion, with the defendants being found guilty. On appeal, the appellants argued that the district judge erred in not dismission the indictment and imposing only a sanction of a two-week continuance. We upheld the sanction imposed by the district judge, stating that there was no abuse of discretion in refusing to impose the extreme sanction of dismissal. In so doing, we spoke as follows:

> The Federal Rules of Criminal Procedure give trial courts broad discretion in imposing sanctions on a party who fails to comply with a discovery order:
>
> > If at any time during the course of the proceedings it is brought to the attention of the court that a party has failed to comply with this rule, the court may order such party to permit the discovery or inspection, grant a continuance, or prohibit the party from introducing evidence not disclosed, or it may enter such other order as it deems just under the circumstances. The court may specify the time, place and manner of making the discovery and inspection and may prescribe such terms and conditions as are just.
>
> Fed. R. Crim. Proc. 16 (d)(2). *See United States Wicker*, 848 F.2d 1059, 1060 (10th Cir. 1988); *United States v. Fernandez*, 780 F.2d 1573, 1576 (11th Cir. 1986). The district court's exercise of discretion is governed by several factors:
>
> > When the government fails to comply with a discovery order, the factors the district court should consider in determining if a sanction is appropriate are (1) the reasons the government delayed producing the requested materials, including whether or not the government acted in bad faith when it failed to comply with the discovery order; (2) the extent of prejudice to the

> defendant as a result of the government's delay; and (3) the feasibility of curing the prejudice with a continuance. *United States v. Euceda-Hernandez*, 768 F.2d 1307, 1312 (11th Cir. 1985); *Fernandez*, 780 F.2d at 1576.

Wicker, 848 F.2d at 1061. If a sanction is imposed, it should be the "least severe sanction that will accomplish . . . prompt and full compliance with the court's discovery orders." *Id.* at 1060 (quoting *Fernandez*, 780 F.2d at 1576). *Cf. Bank of Nova Scotia v. United States*, 487 U.S. 250, 108 S.Ct. 2369, 101 L.Ed.2d 228 (1988) (holding that as a general rule a district court exceeds its supervisory power in dismissing an indictment for prosecutorial misconduct not prejudicial to the defendant and noting that many errors may be remedied by means other than dismissal). "A continuance may normally be the most desirable remedy for the government's failure to comply with a discovery order." *Wicker*, 848 F.2d at 1062.

Our study of the matter convinces us that the district court abused its discretion in dismissing the indictment because of the government's failure to comply with discovery orders. Under the circumstances, it should have opted for a lesser sanction. A duly returned grand jury indictment should not be dismissed for subsequent conduct of a government attorney of the type involved in the instant case. The reason for the government's failure to fully and promptly comply with the district court's discovery orders is attributable to counsel's relative inexperience. As indicated, there is nothing in the record to indicate bad faith. Nor has prejudice been shown. Defense counsel apparently knew about many, if not all, matters they were attempting to obtain from government counsel. And at the moment that the indictment was dismissed, it would appear the government counsel had subtantially complied with all discovery

orders.[2] Government counsel obviously vexed the district judge, but that fact does not justify outright dismissal of the indictment.

Out attention has not been directed to any Tenth Circuit case where we upheld a district court's dismissal of an indictment because of prosecutorial misconduct. For Tenth Circuit cases where reversed a district court's dismissal of an indictment on the basis of prosecutorial misconduct, *see United States v. Kilpatrick*, 821 F.2d 1456 (10th Cir. 1987) (*aff'd* 487 U.S. 250); *United States v. Anderson*, 778 F.2d 602 (10th Cir. 1985); *United States v. Drake*, 655 F.2d 1025 (10th Cir. 1981).

Nor has our attention been directed to any Tenth Circuit case where we ever reviewed a dismissal of an indictment by a district court on the basis of a violation by government counsel of discovery orders. In *United States v. Jacobs*, 855 F.2d 652 (9th Cir. 1988), the Ninth Circuit reversed a district court's dismissal of an indictment because of a violation by government counsel of discovery orders. In so doing, the Ninth Circuit said that dismissal of an indictment on the basis of prosecutorial misconduct is proper only if the misconduct is "flagrant" and causes "substantial prejudice" to the defendant. And in *United States v. Anderson, supra,* where the alleged prosecutorial misconduct did not involve discovery orders but involved the allegedly improper handling of the grand jury, we opined that

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[2] Prior to and during the trial, the government turned over considerable material to the defendants that would conceivably impeach the key government witness, including a number of FBI 302 reports (witness statements), records of other loans with which the key witness was involved, and a letter written to Phoenix from another member of the partnership who would later testify for the government. Defendants, on appeal, have not shown how they would have been prejudiced if required to continue with the trial after receiving the requested materials from the government.

instances where an appellate court has upheld a district court's dismissal of an indictment because of alleged prosecutorial misconduct are "few and far between."

The appellees' motions to dismiss are denied. The judgments dismissing the indictment are reversed and the matter remanded to the district court with direction that the indictment by reinstated in is entirety as to all appellees.

APPENDIX C

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

Nos. 88-2802, 88-2805, 88-2806

UNITED STATES OF AMERICA,
Plaintiff-Appellant,
v.
GENE P. DENNISON, DANA B. WILKERSON, JR., also known as D. B. Wilkerson, also known as Tink Wilkerson, THOMAS C. HERRMANN,
Defendants-Appellees

ORDER
Filed January 9, 1990

Before HOLLOWAY, Chief Judge, McWILLIAMS, McKAY, LOGAN, SEYMOUR, MOORE, ANDERSON, TACHA, BALDOCK, BRORBY, EBEL, Circuit Judges.

This matter comes on for consideration of appellees' petitions for rehearing and suggestions for rehearing en banc in the captioned causes.

Upon consideration whereof, the petitions for rehearing are denied by the panel that rendered the decision sought to be reheard.

In accordance with Rule 35(b) of the Federal Rules of Appellate Procedure, the petitions for rehearing and suggestions for rehearing en banc were transmitted to all the judges of the court in regular active service. No member of the hearing panel and no judge in regular active service on the court having requested that the court be polled on rehearing en banc, Rule 35, Federal Rules of Appellate Procedure, the suggestions for rehearing en banc are denied.

Entered for the Court

S/S ROBERT L. HOECKER
ROBERT L. HOECKER, Clerk

No. 89-1572

In the Supreme Court of the United States

OCTOBER TERM, 1989

GENE P. DENNISON, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

KENNETH W. STARR
Solicitor General

EDWARD S.G. DENNIS, JR.
Assistant Attorney General

DEBORAH WATSON
Attorney
Department of Justice
Washington, D.C. 20530
(202) 514-2217

QUESTIONS PRESENTED

1. Whether the government's violations of the district court's discovery orders warranted the mid-trial dismissal of the indictment with prejudice.

2. Whether the Double Jeopardy Clause or the government's alleged failure to comply with 18 U.S.C. 3731 required dismissal of the government's appeal.

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In the Supreme Court of the United States

OCTOBER TERM, 1989

No. 89-1572

GENE P. DENNISON, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. B1-B11) is reported at 891 F.2d 255.

JURISDICTION

The judgment of the court of appeals was entered on December 1, 1989. A petition for rehearing was denied on January 9, 1990. Pet. App. C1. The petition for a writ of certiorari was filed on April 9, 1990. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. In August 1988, petitioners were indicted in the Eastern District of Oklahoma on charges arising out of their scheme to defraud Phoenix Federal Savings and Loan Association, located in Muskogee, Oklahoma.[1] Dan Stefanoff and petitioners Dana Wilkerson and Thomas Herrmann,[2] acting as the "Denver I-76" partnership, together with petitioner Gene Dennison, successfully induced Phoenix to issue a $3.2 million loan for the purchase of a parcel of land that they had secretly arranged to buy for only $2.15 million. Petitioners and Stefanoff then misrepresented the actual purchase price to Phoenix by orchestrating simultaneous collusive closings and by submitting materially false documents to the bank. Pet. App. B1-B2.

At petitioners' arraignment, the government provided petitioners with a substantial number of documents in compliance with its obligations under Fed. R. Crim. P. 16 and *Brady* v. *Maryland*, 373 U.S. 83 (1963). These documents related principally to the transactions charged in the indictment, and included

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[1] Petitioners were each charged with one count of conspiracy to defraud a savings and loan institution, in violation of 18 U.S.C. 371, one count of bank fraud, in violation of 18 U.S.C. 1344, and one count of wire fraud, in violation of 18 U.S.C. 1343. In addition, each petitioner was charged with three counts of making false statements to a bank, in violation of 18 U.S.C. 1014. Petitioner Herrmann alone faced an additional bank fraud count. Gov't C.A. Br. 1-2 & n.1.

[2] Stefanoff was charged as a co-defendant in the indictment. Before trial, he entered into a plea agreement with the government. In exchange for pleading guilty to certain charges, Stefanoff agreed to testify as a government witness. Pet. App. B2.

FBI 302 reports (reports of interviews conducted by FBI agents) of some 25 witnesses, including Stefanoff. Gov't C.A. Br. 7. The district court also entered "several [pretrial] discovery orders requiring government counsel to make available to defense counsel exculpatory evidence in their possession." Pet. App. B2. Those orders, among other things, required "disclosure * * * of material which may be used to impeach *substantially* the credibility of *key* government witnesses." Gov't C.A. Br. 7-8 (emphasis in original).

2. Trial began on October 3, 1988. Petitioners complained to the district court that the government had withheld certain information tending to impeach Stefanoff and another government witness, Bill Walsh. At the court's direction, the government searched for and provided petitioners with additional FBI 302 reports relating to Stefanoff's and Walsh's involvement in other loan transactions at Phoenix and another Muskogee bank, Victor Federal Savings and Loan Association. Those transactions were not related to the transaction that was the subject of the indictment. Gov't C.A. Br. 11-16.[3]

Petitioners also complained that the government had not given them impeachment material about Stefanoff and Walsh that had been acquired by federal regulatory authorities. Petitioners referred to information uncovered by the Federal Savings and Loan Insurance Corporation and the Federal Home Loan Bank Board during investigations of lending practices at both Phoenix and Victor. Gov't C.A. Br.

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[3] The record showed that some of the information contained in those FBI 302 reports was the same information contained in other reports previously disclosed to petitioners. Petitioners already knew of other information contained in the tardily disclosed reports. See Gov't C.A. Br. 15-16 & n.4.

16-20. At the district court's direction, the government contacted those agencies and obtained whatever information they had about those banks' lending practices and any loans involving Stefanoff and Walsh. *Id.* at 18-20. The government also made available to petitioners all of Victor's loan files. *Id.* at 22-25.[4]

3. In light of the government's tardy and piecemeal compliance with its discovery obligations, petitioners filed a motion to dismiss the indictment with prejudice. Petitioners filed that motion during the government's case-in-chief, well before the government had intended to rest its case. Pet. App. B2.

On October 12, 1988, the district court granted petitioners' motion and dismissed the indictment with prejudice. Pet. App. A1-A6. Although characterizing the prosecutor as "green as a gourd," *id.* at B2-B3,[5] the court concluded that the government's failure to comply with its discovery obligations had been "wholesale and ongoing" and in "bad faith," *id.* at A4. Since a mistrial "would penalize [petitioners] for being here and being ready to go to trial," the court held that dismissal of the indictment with prejudice was "the only appropriate sanction." *Ibid.*

4. On the government's appeal, the court of appeals reversed and remanded to the district court for reinstatement of the indictment. Pet. App. B1-B11. Petitioners moved to dismiss the appeal on two grounds: the government had not diligently prose-

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[4] Shortly after the trial began, the government also provided petitioners with banking records relating to Victor that the FBI had obtained the previous year from the Federal Home Loan Bank Board. The prosecutor had only recently learned of the existence of those records. Gov't C.A. Br. 20-21.

[5] That remark referred to the fact that the prosecutor was trying his second federal criminal case. Pet. App. B6-B7.

cuted its appeal as required by 18 U.S.C. 3731, and the Double Jeopardy Clause barred further proceedings. The court of appeals rejected petitioners' statutory claim, noting that the government had filed its notice of appeal within 30 days and had filed its brief in a timely manner. The court recognized that the government had "obtained from [the court] two extensions totalling sixty days within which to file its brief." Pet. App. B4. The court, however, was "not prepared to hold that such proves a lack of diligence on the part of the government." *Ibid.* "All things considered," the court concluded, "the matter has been diligently pursued by all concerned in this court." *Ibid.*

Addressing petitioners' constitutional claim, the court of appeals determined that the "prosecutorial misconduct" at issue "was not a calculated move by government counsel to provoke [petitioners] into requesting dismissal." Pet. App. B5. In these circumstances, the Double Jeopardy Clause did not bar the government's appeal. *Ibid.* (citing *United States* v. *Dinitz*, 424 U.S. 600 (1976)).

Turning to the merits of the government's appeal, the court accepted the government's concession that it had not fully and promptly complied with the district court's discovery orders. Nevertheless, the court of appeals determined that "the district court's characterization of the prosecutor's conduct as being the result of 'bad faith' is simply not borne out by the record." Pet. App. B6. Rather, the government's lapses stemmed from the prosecutor's "inexperience * * *, and perhaps carelessness." *Ibid.* The court of appeals also found that petitioners "knew about many, if not all, matters they were attempting to obtain from government counsel," *id.* at B9, and that

"at the moment that the indictment was dismissed, it would appear the government counsel had substantially complied with all discovery orders," *id.* at B9-B10. In other words, petitioners "ha[d] not shown how they would have been prejudiced if required to continue with the trial after receiving the requested materials from the government." *Id.* at B10 n.2.

The court of appeals observed that petitioners did not cite "any Tenth Circuit case where [the court] upheld a district court's dismissal of an indictment because of prosecutorial misconduct." Pet. App. B10. Since "there [was] nothing in the record to indicate bad faith," *id.* at B9, and petitioners had not shown any prejudice from the government's actions, the court of appeals held that the district court "abused its discretion in dismissing the indictment because of the government's failure to comply with discovery orders," *ibid.*

ARGUMENT

1. Petitioners principally contend (Pet. 6-9) that the government's repeated violations of the district court's discovery orders warranted dismissal of the indictment with prejudice. Dismissal of an indictment for prosecutorial misconduct is an extraordinary sanction reserved for extreme circumstances of flagrant government misconduct. See, *e.g.*, *United States* v. *White*, 846 F.2d 678, 693 (11th Cir. 1988); *United States* v. *Wiley*, 794 F.2d 514, 515 (9th Cir. 1986); *United States* v. *Anderson*, 778 F.2d 602, 606 (10th Cir. 1985). Moreover, this Court has made plain that "a district court exceeds its powers in dismissing an indictment for prosecutorial misconduct not prejudicial to the defendant * * *." *Bank of Nova Scotia* v. *United States*, 487 U.S. 250, 255 (1988); see, *e.g.*, *United States* v. *Mechanik*, 475

U.S. 66, 71-72 (1986); *United States* v. *Hasting*, 461 U.S. 499, 506 (1983). The proper approach "has thus been to identify and then neutralize the taint by tailoring relief appropriate in the circumstances to assure the defendant * * * a fair trial." *United States* v. *Morrison*, 449 U.S. 361, 365 (1981); see, *e.g.*, *United States* v. *McClintock*, 748 F.2d 1278, 1285 (9th Cir. 1984), cert. denied, 474 U.S. 822 (1985).[6]

Here, as the court of appeals correctly determined, the district court abused its discretion in imposing the draconian sanction of dismissal of the indictment with prejudice. The record did not support the district court's conclusion that the government deliberately and in bad faith hid exculpatory information from petitioners. At most, as the court of appeals concluded, the record shows that the prosecutor's inexperience, and perhaps carelessness, accounted for the government's lapses. Moreover, petitioners did not suffer any prejudice from the government's piecemeal discovery disclosures. As the court of appeals recognized, petitioners "knew about many, if not all, matters they were attempting to obtain from government counsel," Pet. App. B9, and "at the moment

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[6] A similar regime limits a court's discretion to impose sanctions for discovery violations under Fed. R. Crim. P. 16(d)(2). In those circumstances, a court must consider such factors as the reason for the violation, the delay in providing the discovery, and the feasibility of curing any prejudice with a continuance. See, *e.g.*, *United States* v. *Fernandez*, 780 F.2d 1573, 1576 (11th Cir. 1986). And any sanction imposed should be the "least severe sanction that will accomplish . . . prompt and full compliance with the court's discovery orders." *United States* v. *Wicker*, 848 F.2d 1059, 1060 (10th Cir. 1988) (quoting *United States* v. *Sarcinelli*, 667 F.2d 5, 7 (5th Cir. 1982)).

that the indictment was dismissed, it would appear the government counsel had substantially complied with all discovery orders," *id.* at B9-B10. In these circumstances, a brief continuance—a remedy far less drastic than outright dismissal—plainly would have enabled petitioners to take full advantage of the additional impeachment material disclosed by the government.[7]

2. Petitioners also contend (Pet. 12-15) that since the Double Jeopardy Clause barred further proceedings in the case, the court of appeals should have dismissed the government's appeal. In this case, the district court dismissed the indictment with prejudice in response to petitioners' joint motions for dismissal or a mistrial. As this Court has made clear, when a defendant seeks to end the trial on grounds unrelated to guilt or innocence, the Double Jeopardy Clause does not bar the government from appealing that ruling. *United States* v. *Scott*, 437 U.S. 82, 98-99 (1978). The Court, however, has carved out a narrow exception to this rule: "Only where the governmental conduct in question is intended to 'goad' the

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[7] Petitioners suggest in passing (Pet. 10-12) that the decision below conflicts with *United States* v. *Wicker*, *supra*. In that case, the government disclosed the results of certain laboratory tests to the defense several weeks after the district court's discovery deadline; the district court therefore excluded that evidence from the government's case as a sanction under Fed. R. Evid. 16(d)(2). 848 F.2d at 1060. The court of appeals affirmed, holding that the district court properly considered, among other factors, the fact that the "defendants were prejudiced by the government's noncompliance." Id. at 1061. Here, by contrast, the court of appeals determined that the government's tardy disclosure of impeachment material could not have prejudiced petitioners. For that reason, the decision below is consistent with *Wicker*.

defendant into moving for a mistrial may a defendant raise the bar of double jeopardy to a second trial after having succeeded in aborting the first on his own motion." *Oregon* v. *Kennedy*, 456 U.S. 667, 676 (1982); see *United States* v. *Dinitz*, 424 U.S. 600, 611 (1976). Here, as the court of appeals expressly concluded, the "prosecutorial misconduct * * * was not a calculated move by government counsel to provoke defendants into requesting dismissal." Pet. App. B5. Accordingly, the Double Jeopardy Clause would not bar a retrial and therefore did not warrant dismissal of the government's appeal.

Finally, petitioners contend (Pet. 15-17) that the government did not diligently prosecute its appeal as required by 18 U.S.C. 3731. The record shows that the district court dismissed the case on October 12, 1988, and the government filed a notice of appeal on November 10, 1988—within the 30-day period required by Fed. R. App. P. 4(a). On January 20, 1989, the trial transcript was filed in district court, which triggered the setting of a briefing schedule; the court of appeals ordered the government to file its opening brief on March 1, 1989. Thereafter, the court of appeals, on the government's request, granted two extensions of time—ultimately to April 28, 1989—within which to file its brief. The government filed its brief on that date. Pet. App. B3. Since the government complied with the court of appeals' scheduling order, it plainly prosecuted the appeal with the diligence contemplated by 18 U.S.C. 3731.[8]

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[8] Petitioners suggest (Pet. 17) that the government misrepresented the facts when, in requesting the first extension of time, it stated that additional time was needed because of the press of business in the United States Attorney's Office in Muskogee, Oklahoma. Petitioners point out that attorneys

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

KENNETH W. STARR
Solicitor General

EDWARD S.G. DENNIS, JR.
Assistant Attorney General

DEBORAH WATSON
Attorney

MAY 1990

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for the Department of Justice in Washington, D.C., rather than attorneys in the Eastern District of Oklahoma, prepared and filed the government's brief.

The record shows that when the United States Attorney's Office received a copy of the trial transcript in late January 1989, it sent a copy of that transcript to the Department of Justice in order to assist the Solicitor General in his decision whether to authorize further review. After a review of the record, the Solicitor General authorized an appeal and recommended that the briefing be handled by an attorney in the Criminal Division of the Department of Justice. The Solicitor General therefore asked the United States Attorney's Office to file a motion in the court of appeals for a second extension of time in order to give that attorney adequate time to prepare the government's brief. See Gov't Resp. to Appellees' Mot. to Dis. 5-7, *United States* v. *Dennison*, No. 88-2802 (10th Cir. filed June 15, 1989). Accordingly, the fact that an attorney in the Justice Department filed the government's brief is not at all inconsistent with representations made by the United States Attorney in connection with the first request for an extension of time. Moreover, since the government disclosed all of these facts to the court of appeals, that court was well aware of the circumstances surrounding the government's need for additional time.

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